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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 49

THE WESTERN UNION TELEGRAPH COMPANY,
Petitioner,

vs.

KATHARINE F. LENROOT, Chief of the Children's Bureau, United States Department of Labor,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER

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Plaintiff's Concessions

Plaintiff concedes that if she is right Congress must have intended to deny the use of the mails, as well as the privilege of sending interstate or foreign telegrams, to anyone using child labor or violating the wage or hour provisions. Manifestly, we think, this is not so. If Congress desired to enforce a policy by deprivation of the use of the mails it would have said so, and not expected a court to infer it from the prohibition of shipment of goods. We assume that a direct provision to this effect would have been plainly unconstitutional. Congress has power to establish

post offices and post roads, but not for the use of everyone except persons with red hair. It could not prescribe a rule of conduct to govern intrastate commerce and enforce its policy by denying the use of the mails to those who did not comply. It "may not exercise its control over the mails to enforce a requirement which lies outside its constitutional province", *Electric Bond Company* vs. *Commission*, 303 U. S. 419, 442 (1938). And while it may prohibit this or that specified kind of traffic in interstate communication by telegraph, depending on the nature of the traffic itself, it could not, we think, deny all interstate telegraph facilities to all persons who do not order their intrastate lives in accordance with congressional specifications. So Congress did *not* intend to deny child-labor employers the use of the mails, and therefore did not regard communications as goods.

The plaintiff also concedes, as we read her brief, that if a railroad company employed child labor to load a carload of freight, delivery of the freight must be arrested for thirty days, and that if it were loaded by employees paid less than the minimum wage it could never be delivered at all. These admissions are frank, and highly creditable in that they logically follow from the rest of plaintiff's argument and do not seek to confuse or evade the issue. When we point out that the plaintiff's case must stand or fall with them, we feel that there is little that we need add.

Even if the words used by Congress, read in the light of the legislative history, seemed to require such absurd conclusions, we might still fall back on the classical language of *United States* v. *Kirby*, 74 U. S. 482 (1868) at pages 486-7:

> "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, *or an absurd consequence*. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. * * * The common sense of man approves the judgment mentioned by Puffendorf, that the Bolog-

nian law which enacted, 'that whoever drew blood in the streets should be punished with the utmost severity,' did not extend to the surgeon who opened the vein of a person who fell down in the street in a fit".

Plaintiff's Comments on the Exemption of Common Carriers (Sec. 15 (a))

This exemption, discussed in our main brief (page 34), is as follows:

> " * * * no provision of this act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods *not produced by such common carrier* * * *."

It will be noted that the privilege of the carrier is with respect to transportation, while the prohibition with respect to child labor does not mention transportation but only shipment or delivery for shipment. The prohibition with respect to goods produced in violation of the wage and hour provisions includes prohibition of transportation as well as of shipment and delivery in commerce.

Our position in the court below was that telegraph companies do not ship anything and that they do not transport anything. But if it could be supposed that Congress intended to include them in an act prohibiting shipment or transportation, then they must be included in the exemption applicable to carriers transporting in the regular course of their business. The exemption applies only where the goods transported are "not produced by such common carrier"; but if the plaintiff's view is accepted that by virtue of the artificial definition of production every carrier who handles goods produces them, we pointed out that there could be no such thing as goods not "produced" by the carrier, and the exemption would be meaningless.

The plaintiff now concedes, as we understand it, that the artificial definition of production has no application to

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goods handled by a carrier which are produced (in the ordinary sense) by the carrier's patron; and consequently that telegraph companies as well as railroad companies may ignore the child labor provisions if they do not themselves employ child labor. Apparently they concede that their position leads to the conclusion that if a railroad company did employ child labor in connection with a shipment the delivery of the shipment must be held up for thirty days, and that if a railroad company did employ anyone in violation of the wage conditions in connection with a shipment such shipment could never be delivered at all.

Apart from the absurdity of the conclusion, the error in the reasoning is manifest. Whether the railroad company or the telegraph company is engaged in production, within the meaning of the act, cannot depend on the kind of labor employed in handling the "goods". Either handling by a carrier (or transmission company) is production as Congress intended to use the term or it is not. If it is not production when no child labor is employed, the use of child labor cannot turn it into production.

The plaintiff's position is no more than this, that child labor in commerce is to be treated as prohibited although Congress expressly refused to prohibit it.

Messages Containing News

The plaintiff says that it is common knowledge that Western Union sells news in competition with others, and that therefore, even if the court accepts our contention that by "goods" Congress meant some "res" produced, transported and sold to be consumed under competitive conditions, that part of the company's business at least would be prohibited by the act while child labor is employed.

There is nothing about this in the record, and we do not see how we can properly argue about it at this late date. If it is common knowledge that some messages contain news it is certainly not common knowledge that they are the sub-

ject of competition. The point in any event requires no consideration except on the assumption that the court agrees with our principal contention that Congress did not regard communications as goods; and if that contention is sound it is more than far-fetched to assume that Congress intended to make a special exception of this particular kind of communication, of which there is nothing to suggest that it had ever heard. The plaintiff did not think of it until six years after the passage of the act, and after an exchange of arguments in three courts. Certainly Congress did not think of it in 1938.

Whatever the stipulation of facts might have shown if this matter had been discussed earlier, it may properly be assumed that the messages in question are the communication of intelligence by wire, that tariffs are filed for them as for other communications, and that whether the charges are paid by the sender or the addressee, and whether they are higher than they otherwise would be because of extra cost necessarily incurred in rendering the service, they are still essentially communications, involving no sale of consumer goods and no unfair competition in interstate trade by reason of any savings resulting from the use of child labor in other parts of the telegraph establishment.

In *Moore* v. *New York Cotton Exchange*, 270 U. S. 593, 604-605 (1926), the court had this to say:

> "It is equally clear that the contract with the Western Union for the distribution of the quotations to such persons as the New York exchange shall approve does not fall within the reach of the Anti-Trust Act. Under that contract, the exchange at its own expense, collects the quotations and delivers them to the telegraph company for distribution to such approved persons. The real distributor is the exchange; the telegraph company is an agency through which the distribution is made. In effect, the exchange hands over the quotations, as it might any other message, to the telegraph company for transmission, charges to be collected from the receivers. The payment which the telegraph company makes to

> the exchange is for the privilege of having the business. It does not alter the character of the service rendered. In furnishing the quotations to one and refusing to furnish them to another, the exchange is but exercising the ordinary right of a private vendor of news or other property. As a common carrier of messages for hire, the telegraph company, of course, is bound to carry for all alike. But it cannot be required—indeed, it is not permitted—to deliver messages to others than those designated by the sender."

Citing with approval *Matter of Renville*, 46 New York App. 37, 43-33 (1899).

All messages contain news. Usually the sender pays to have the news delivered to the addressee. Sometimes the addressee is so anxious to get the news that he arranges for it to be sent and pays for it himself. But in either case what is paid for is a communication service; there is no sale to the addressee of any property right in the news. If a resident of New Jersey wishes to be informed, round by round, of the developments in a prize fight in Chicago the news which he seeks must of necessity be manufactured in Illinois. It cannot possibly be manufactured in New Jersey. The case cannot therefore be within the scope of the evil which Congress sought to reach in the act held invalid in *Hammer* vs. *Dagenhart*, which is the same evil and the only one which Congress sought to correct here. "Thus, if one State desired to limit the employment of children", argued the Solicitor General in *Hammer* vs. *Dagenhart* (247 U. S. at page 254) "it was met with the objection that its manufacturers could not compete with manufacturers of a neighboring State which imposed no such limitation. The shipment of goods in interstate commerce by the latter, therefore, operates to deter the former from enacting laws it would otherwise enact for the protection of its own children." New Jersey would not be deterred from enacting stricter child labor laws because of any fear that its residents would be ruined by a lowering of the rates for the

transmission of sporting news by ticker from Chicago, even if it could be supposed that the presence or absence of child labor in the delivery of ordinary messages would in any way affect those rates.

The plaintiff's brief cites cases to the effect that the prohibitions of the act are not confined to competitive situations, and of course there is no dispute about that where the wage and hour provisions are involved and there is a direct prohibition of employment in commerce in violation of those provisions. The prohibition of transportation in commerce of goods so produced is merely an additional sanction, beyond the criminal penalties, to assure observance of the prohibition expressly imposed. As to child labor there was no prohibition of employment, and the only evil to be remedied was unfair competitive advantage in interstate trade.

Plaintiff's Comments on the Legislative History

We find nothing in the plaintiff's brief which answers or weakens the argument in our main brief based on a full analysis of the legislative history. The Senate Committee on Education and Labor appears to have been for a time at least in general sympathy with the design of the House. But the Senate by an overwhelming vote refused to follow the recommendation of that committee and instead adopted the recommendations of the Committee on Interstate Commerce. The whole history of the legislation, commencing with the President's message, shows that the only child labor provision which survived was intended to re-enact and re-submit to this court the prohibition which had been held invalid in *Hammer* vs. *Dagenhart*. That provision (39 Stat. 675) certainly did not apply to telegrams. That prohibition also was addressed only to a producer, manufacturer, or dealer, and there was no artificial definition of those terms. So far as child labor was concerned, the Senate, from first to last, insisted on re-submitting the

Hammer-Dagenhart issue and also insisted with equal firmness on doing nothing more. Not one other thing. And the Senate was sustained by the conference report and by Congress.

In the definition of "goods" the insertion of "articles or subjects of commerce of any character" was not made by the Conference Committee, and did not represent any compromise between House and Senate as to the prohibition of child labor. It was inserted in the original bills early in their history, at a time when the bills prohibited child labor in commerce, and could not have been designed to affect the operations of a telegraph company, which were otherwise covered by the bills as to child labor as well as wages and hours. The Act of 1916 (39 Stat. 675) had not contained the word "goods" but had enumerated "any article or commodity the product of any mine or quarry" or "the product of any mill, cannery, workshop, factory or manufacturing establishment." "Articles or subjects of commerce of any character" was more comprehensive, and no doubt intended to be; but the prohibition still did not apply to them unless they were subjects of commerce which are "shipped", and therefore, whether we give any weight or not to the principle of *ejusdem generis*, they do not include communications.

The Reference to "Transportation" in *Telegraph Company* vs. *Texas*, 105 U. S. 460, 464 (1881)

This court did say:

> "A telegraph company occupies the same relation to commerce as a carrier of messages, that a railroad company does as a carrier of goods. Both companies are instruments of commerce, and their business is commerce itself. They do their transportation in different ways, and their liabilities are in some respects different, but they are both indispensable to those engaged to any considerable extent in commercial pursuits."

The use of the word "transportation" is obviously a metaphor. The question was whether a telegraph company was engaged in commerce and whether under the Post Roads Act it was an agent of the United States in sending Government messages. The question was not whether the transmission of telegrams was included in a statute prohibiting transportation or shipment.

Conclusion

In concluding this reply it may be appropriate to quote the following from *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, at 521-522 (1942):

> "We cannot, therefore, indulge in the loose assumption that, when Congress adopts a new scheme for federal industrial regulation, it thereby deals with all situations falling within the general mischief which gave rise to the legislation. Such an assumption might be valid where remedy of the mischief is the concern of only a single unitary government. It cannot be accepted where the practicalities of federalism—or, more precisely, the underlying assumptions of our dual form of government and the consequent presuppositions of legislative draftsmanship which are expressive of our history and habits—cut across what might otherwise be the implied range of the legislation. Congress may choose, as it has chosen frequently in the past, to regulate only part of what it constitutionally can regulate, leaving to the States activities which, if isolated, are only local. One need refer only to the history of Congressional control over the rates of intrastate carriers which affect interstate commerce, and the amendment of August 11, 1939, to the Federal Employers' Liability Act, extending the scope of that Act to employees who 'shall, in any way directly or closely and substantially, affect' interstate commerce, 53 Stat. 1404. Compare *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349. The history of Congressional legislation regulating not only interstate commerce as such but also activities intertwined with it, justi-

fied the generalization that, when the Federal Government takes over such local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, *those charged with the duty of legislating are reasonably explicit and do not entrust its attainment to that retrospective expansion of meaning which properly deserves the stigma of judicial legislation.*" (Emphasis supplied.)

The decree should be reversed and the complaint dismissed.

Respectfully submitted,

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